



REPUBLIC OF KENYA



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**In re Estate of Mwangi Magondu (Deceased) (Succession Cause
1164 of 2013) [2022] KEHC 12357 (KLR) (21 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 12357 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
SUCCESSION CAUSE 1164 OF 2013
K KIMONDO, J
JUNE 21, 2022
[FORMERLY NYERI P & A CAUSE NO. 296 OF 2010]
RE ESTATE OF MWANGI MAGONDU (DECEASED)
JULIUS GICHEHA MWANGI
OBADIAH KARIUKI MWANGI
MONICA MUTHONI MWANGI.....CO-
ADMINISTRATORS
VERSUS
NAHASHON MBERI MWANGI
.....OBJECTOR**

JUDGMENT

1. Mwangi Magondu (hereafter the deceased) died intestate on 24th September 2005.
2. He was survived by the following children: Leah Kabura Muhua, Julius Gicheha Mwangi (the objector), Obadiah Kariuki Mwangi, Hawkins Evans Mbuthia Mwangi (now also deceased), Nahashon Mberi Mwangi, Lucy Njoki Manyeki and Mercy Nunga Mwangi.
3. The deceased was the registered proprietor of Loc.8/Munyutha/41 which he sub-divided into five portions being Loc.8/Munyutha/Ndutumi/797; Loc.8/Munyutha/Ndutumi/798; Loc.8/Munyutha/Ndutumi/799; Loc.8/Munyutha/Ndutumi 800; and, Loc. 8/Munyutha/Ndutumi/801.
4. It is common ground that during his lifetime, he distributed four of those portions to his four sons. The contest now is over the inheritance of Loc. 8/ Munyutha/Ndutumi/799 measuring 2.8 acres (hereafter the suit land).
5. However, Obadiah Kariuki Mwangi did not finalize the transfer of his portion known as Loc. 8/ Munyutha/Ndutumi/801. All his siblings agree that it should now devolve to him absolutely.



6. According to the joint administrators, the suit land should devolve equally to all the children of the deceased. The protestor on the other hand proposes that the entire portion should go to him because the deceased had reserved it for their sister, Mercy Nunga, who is mentally challenged. The protestor argues that he remains her guardian and has planted coffee on the land. The administrators disputed the claim that the protestor has planted crops on the land.
7. I should add that save for Mercy Nunga, the other two daughters of the deceased have renounced their right to a share of the estate. Doubt is completely erased by their written consent as well as their testimony.
8. On 28th September 2012, the court directed that the protested summons for confirmation of the grant be heard viva voce.
9. PW1 was the co-administrator, Julius Gicheha Mwangi. He testified that the deceased gave each of the four sons an acre of land before he died. He could not remember the actual date the objector constructed a permanent house on the suit land. The subdivision however was done around 1998. All the other sons have put up their houses on the respective portions and some titles issued. The suit land was the remainder of the land and is sandwiched between the other portions. He opined that it should be shared equally between the three surviving sons and Mercy Nunga.
10. He said that the protestor refused to build on his own portion and instead put up a permanent house on the suit land. At that time, the deceased was still alive and had not subdivided the land. He conceded that he (PW1) has not planted anything on the suit land and that it is in the same state as the deceased left it. He denied that the protestor has planted coffee or subsistence crops there since the death of the deceased.
11. He testified that he used to take care of the deceased until he died; and, that his last words to him were that the suit land belongs to his sons. The witness denied that the deceased left the land to the protestor to take care of Mercy. He said that the protestor and his family live in Nairobi. He however conceded that two of his workers live on the suit land but cultivate only the portion allocated to the protestor by the deceased.
12. He proposed that Mercy Nunga and the three surviving sons should get 0.7 acres each and that they would all continue to take care of Mercy.
13. That version was supported fully by his brother, Obadiah Kariuki Mwangi who testified as PW3. He could not also recall the date when the protestor constructed a permanent house on the suit land.
14. PW2 was Monica Muthoni Mwangi. She was substituted in the proceedings on behalf of her late husband, Hawkins Evans Mbuthia Mwangi. She confirmed that neither she nor her late husband had any interest in the suit land.
15. PW4 Leah Kabura Mukua and PW5 Lucy Njoki Manyeki are daughters of the deceased. The material part of their evidence is that they are married and claim no share of the suit land.
16. The objector, Nahashon Mberi Mwangi, did not take to the stand owing to a severe illness. The parties agreed to admit into the record his affidavit of protest sworn on 9th August 2012. The material facts are as follows: that the deceased sub-divided his land in 1998 into five portions. Each of his four sons got an acre. The protestor's parcel is Loc. 8/ Munyutha/Ndutumi/800 and he has since obtained title.
17. The protestor deposed that in 1997 the deceased permitted him to construct a permanent house on the suit property and directed him to take care of his mentally challenged sister, Mercy Nunga. It was



his evidence that the suit land was meant to benefit their sister. As he remains her guardian, he stakes a claim to the entire land.

18. The co-administrators filed their submissions on 18th May 2022. Learned counsel for the protestor opted not to file any.
19. I take the following view of the matter. Sections 26, 27, 28 and 29 of the *Law of Succession Act* as read together with Rule 73 of the *Probate and Administration Rules* donate complete discretion to this court to order a specific share to a dependant. See generally *Re Estate of Morgan Njoroge Gakuo (Deceased)*, Nairobi High Court Cause No. 591 of 2007 [2016] eKLR; *Re Estate of Manasseh Mwea Kariuki (Deceased)*, Murang'a High Court Cause No. 57 of 2014 [2021] eKLR.
20. There are a few other important considerations. Firstly, in making such provision, the court must take into account any other properties that may have been given to the beneficiaries during the lifetime of the deceased. In this case, it is common ground that the deceased gave each of his four sons 1 acre each comprised in the four properties known as Loc.8/Munyutha/Ndutumi/797; Loc.8/Munyutha/Ndutumi/798; Loc.8/Munyutha/Ndutumi/800; and, Loc. 8/ Munyutha/Ndutumi/801.
21. Secondly, the Act does not discriminate between sons and daughters or even married daughters. In the instant case, Mercy Nunga is unmarried and I received reliable evidence that she is mentally challenged. Her father did not give her any property. I am thus inclined to give her 1 acre out of the suit land. That portion should be as much as practicable include the area where the deceased's house stands in which she resides.
22. Thirdly, in view of the mental challenges facing Mercy Nunga and due to the conflicting evidence of her guardianship, I order that her title will be held in trust by her brother, Nahashon Mberi Mwangi. I note that the applicants concede as much in their written submissions filed on 18th May 2022.
23. Fourthly, and like I stated earlier, the other daughters of the deceased filed a consent and gave unequivocal testimony that they have renounced their rights to any share of the suit land. I will respect their clear wishes. I am equally satisfied from the evidence of PW2 that she lays no claim to the suit land.
24. Fifthly, I am not satisfied on the evidence that the protestor was given by the deceased exclusive rights to the suit land. The remainder of the suit land (after setting apart Mercy's portion of 1 acre above) and approximately 1.8 acres shall be divided equally between the three surviving sons Julius Gicheha Mwangi, Obadiah Kariuki Mwangi, and Nahashon Mberi Mwangi. However, there shall be a condition that the portion to Nahashon Mberi Mwangi must be carved out or surveyed to ensure that his permanent house falls on his share.
25. That is the justice of this case. My final orders are thus as follows-
 - i. That the suit property Loc.8/Munyutha/Ndutumi/799 measuring approximately 2.8 acres shall be distributed as follows: 1 acre shall devolve wholly to Mercy Nunga Mwangi. As she is mentally challenged, I order that her title be held in trust by Nahashon Mberi Mwangi.
 - ii. That as a further condition, the portion above shall be carved out or surveyed as much as practicable to include the area where her father's (the deceased's) house stands.
 - iii. That the remainder of the suit land Loc.8/Munyutha/Ndutumi/799 (after setting apart Mercy Nunga's portion of 1 acre above) of approximately 1.8 acres shall be divided equally between the three surviving sons Julius Gicheha Mwangi, Obadiah Kariuki Mwangi, and Nahashon Mberi Mwangi. However, there shall be a condition that the portion to Nahashon



Mberi Mwangi must be carved out or surveyed to ensure that his permanent house falls within it.

iv. That the property known as Loc.8/Munyutha/Ndutumi/801 shall devolve wholly to Obadiah Kariuki Mwangi.

26. The grant shall be confirmed in terms of this judgment.

27. In the interests of justice, each party shall bear its own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANG'A THIS 21ST DAY OF JUNE 2022.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of:

Mr. Murigu holding brief Ms. Mwai for the petitioners instructed by Lucy Mwai & Company Advocates.

Ms. Susan Waiganjo, Court Assistant.

